Supreme Court, U.S.
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No. 99-519

IN THE

Supreme Court of the United States

STEVEN PRESCOTT, ROBERT F. BERRY, CHERYL JONES, KAREN PIERCE, AND CHRISTINE M. TURNEY,

Petitioners,

v.

COUNTY OF EL DORADO, KATHY LIBICKI, AND EL DORADO COUNTY EMPLOYEES ASSOCIATION, LOCAL NO. 1,

Respondents.

On Petition for Writ of *Certiorari* to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF

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ARGUMENT

I. The Court Should Grant *Certiorari* Because There Is a Conflict Among the Courts of Appeals Concerning Nonmembers' Standing to Challenge the Validity of Provisions of Collective Bargaining Agreements Governing Their Terms and Conditions of Employment.

The first question presented in the Petition of Steven Prescott *et al.* ("the nonmembers") is whether public employees possess standing to challenge, as void as against federal constitutional law and public policy, the legality of one of the terms of the collective bargaining agreement ("CBA") governing their terms and conditions of employment. *See* Pet. at i, ¶ 1, 9-22.[1]

Respondents County of El Dorado ("County"), Kathy Libicki ("Libicki"), and El Dorado County Employees Association, Local No. 1 ("EDCEA"; collectively, "Respondents"), dispute virtually every particular of the Petition ("Pet."), asserting that the conflict between the Court of Appeals' decision below, Appendix ("App.") A at 15a-17a, and other circuits is illusory because the cases cited as "implicit standing" decisions neither "considered" nor "decided" standing. Furthermore, their Brief in Opposition ("Opp.") eludes the core question of the nonmembers' past and potential injuries.

As to the first point, Respondents miscast decisions contrary to their position. *Hohe v. Casey*, 956 F.2d 399 (3d Cir. 1992), reversed a district court's explicit finding that nonmembers lacked standing to challenge one of their terms and conditions of employment, *id.* at 412, *reversing* 740 F. Supp. 1092, 1098 (M.D. Pa. 1989), and ruled against nonmembers on the **merits** of their claim. However,

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[1] While Respondents state that "[t]he gravamen of the[nonmembers'] complaint is that ... the financial statement accompanying the notice was not properly *verified*," Opp. at 2, numerous other serious deficiencies were adjudicated by both courts. *Prescott v. County of El Dorado*, 915 F. Supp. 1080, 1085-91 (E.D. Cal. 1996); **see also** Pet. App. A at 14a and App. C at 33a.

Respondents recast *Hohe* as a decision that **affirmed** the district court's determination that the nonmembers suffered "no harm" by virtue of the indemnification clause, and therefore lacked standing, something that the Third Circuit failed to mention. Apparently recognizing the difference between their descriptions and reality, Respondents offer creative speculation as to why the Third Circuit reached the merits of the issue. Opp. at 10 fn. 4.

Respondents dismiss the remaining decisions striking down indemnification agreements,[2] asserting that, because they "do not explicitly mention or discuss standing.... [t]hey are not ... 'standing' decisions, and cannot be in conflict with the standing decisions in this case or with *Hohe*'s suggestion about 'standing.'" Opp. at 10 (footnote omitted), *citing* H. BLACK, LAW OF JUDICIAL PRECEDENTS 37 (1912). Respondents, therefore, disparage "any doctrine of 'implicit standing,'" as "the case law is silent." *Id.*

What Respondents fail to address in any fashion, however, is Article III's "case or controversy" requirement, and how "standing" to litigate a claim is "an indispensable part of the plaintiff's case." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). A contrary conclusion would call into question the validity of virtually every federal court decision which eschews specific discussion of the plaintiff's standing to sue. That is perhaps why Professor Black goes on to state:

> If the case could not have been decided as it was without the recognition and application of a given rule or principle of law, the decision is an authority for that rule or principle, although it may not have been expressly stated or mentioned by the court, but only tacitly assumed.

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[2] *Weaver v. University of Cincinnati*, 970 F.2d 1523, 1536-38 (6th Cir. 1992), *cert. denied sub nom. Weaver v. Steger*, 507 U.S. 917 (1993); *Cramer v. Matish*, 924 F.2d 1057 (table), 1990 WL 169640 (6th Cir. 1990); *Jordan v. City of Bucyrus*, 754 F. Supp. 554, 558-59 (N.D. Ohio 1991).

BLACK, *supra* at 41 (1912).

Furthermore, as recognized by the court of appeals, App. A at 16a ("it can be assumed that Prescott suffered some injury when the fees were deducted from his paycheck"), the nonmembers' injury occurs upon **the public employer's taking** of agency fees absent compliance with "the constitutional requirements for the Union's collection of agency fees." *Teachers Local No. 1 v. Hudson*, 475 U.S. 292, 301, 310 (1986); *see also Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 222 (1977) ("[t]o compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests"); **compare** App. C at 34a (sterilely describing the injury as "a violation of the standards enunciated in *Hudson*"). Respondents initially concede that the nonmembers' injury lies in the public employer's seizure of agency fees, Opp. at 5-6, but later attempt to resurrect the district court's misunderstanding of their injury, Opp. at 6, misidentifying the periods relevant to this case. *See* Pet. at 10-11 (discussing both "prospective declaratory relief" and "the uncontroverted fact that the public employer had done nothing to ensure that its employees' constitutional rights were not violated").

The nonmembers seek redress (*i.e.*, declaratory relief and damages) for past violations of their constitutional rights arising, in part, out of the existence of the indemnification provision, as a State's "statute, ordinance, regulation, custom, or usage," 42 U.S.C. § 1983 (West. Supp. 1999). That they seek **future** relief (*i.e.*, permanent injunctive relief) to prevent or diminish the possibility of future violations of their rights — "speculative" to some degree by definition — is all that is discussed by Respondents. Opp. at 6.[3]

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[3] To this end, Respondents discuss extra-record matters regarding their current conduct and preliminary rulings entered by the district court. Taken in the best possible light, this proves nothing more than that Respondents brought themselves into compliance with existing judicial mandate by stopping illegal

(continued...)

Respondents' argument that any potential for future injury is purely "speculative," Opp. at 6-7, is disingenuous. The continuing bargaining relationship (including a forced-unionism provision) between the County and EDCEA certainly renders the possibility of "harm" more than "speculative," particularly in light of the County's and Libicki's continuing fee seizures, Opp. at 6 & fn.2, **for nearly five months after** the Ninth Circuit declared EDCEA's notice and procedures inadequate under *Hudson*. App. A at 6a-10a, 12a-15a.

Indeed, the nonmembers clearly face the prospect of being "compelled to subsidize the public employer's defense against their meritorious lawsuit to vindicate their constitutional rights for violations that already have occurred," Pet. at 9-10. Respondents try to downplay this by claiming that the nonmembers "assume[] facts not yet in evidence." Opp. at 7. Respondents' complaints are two-fold: (1) that the nonmembers' argument improperly "assumes that the union's defense of the employer's liability ... is not properly 'chargeable,'" (Opp. at 7 & fn.3; *but see Ellis v. Railway Clerks*, 466 U.S. 435, 453 (1984) (organizing expenses are non-chargeable), and *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 519, 528 (1991) (chargeable activities must "not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop"; "We have long recognized the important political and expressive nature of litigation"), *citing NAACP v. Button*, 371 U.S. 415, 431 (1963));[4] and (2) that EDCEA will, in fact, "charge petitioners for that defense." Opp. at 7.

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[3] (...continued)
fee deductions, and partially redressed past violations, nearly five months after the Ninth Circuit rendered its decision.

[4] *See also Ellis*, 466 U.S. at 452 n.13 ("it would be perverse to ... allow[] the union to charge to objecting nonmembers part of the costs of attempting to convince them to become members"). Is it any less perverse to allow a defendant to charge to successful plaintiffs the costs of their defense?

Respondents both miss and make the point. While failing to rebut the prospect that the nonmembers' **might** be charged for such expenditures, Respondents concede that EDCEA considers such expenditures to be chargeable to nonmembers. Opp. at 7-8. This reconfirms the "real and immediate threat that [the nonmembers] will be wronged again—a 'likelihood of substantial and immediate irreparable injury,'" *Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983), *quoting O'Shea v. Littleton*, 414 U.S. 488, 502 (1974) — that the nonmembers will again suffer injury adequate to confer upon them standing to challenge the provision under which they might be compelled to subsidize those union expenditures, *i.e.*, the indemnification provision challenged here. *Stamford Bd. of Educ. v. Stamford Educ. Ass'n*, 697 F.2d 70, 74 (2d Cir. 1982), *citing Patterson v. American Tobacco Co.*, 535 F.2d 257, 269 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976).[5] That the County/EDCEA bargaining relationship is continuing and imposes a forced-unionism obligation upon nonunion County employees is sufficient to constitute the "real and immediate threat" sufficient to sustain the nonmembers' standing. The record need not prove with certitude that EDCEA intends to use seized fees to underwrite the County's and Libicki's costs in defending against the nonmembers' meritorious lawsuit.

Respondents assert that the Ninth Circuit's decision "devastatingly dispel[s]" the notion that nonmembers suffer harm by virtue of an indemnification agreement and its negative effect upon the public employer's incentives to insure compliance with *Hudson*. Opp. at 11, *citing Weaver v. University of Cincinnati*, 764 F. Supp. 1241, 1247 (S.D. Ohio 1991), *aff'd in part*, 970 F.2d 1523 (6th Cir. 1992),

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[5] Respondents also miscast the substance of *Lehnert* as holding that there is no "injury" here. Opp. at 8. However, that *Lehnert* did not hold that preparations for an illegal strike were non-chargeable is not equivalent to a judgment by this Court that nonmembers fail to prove that they suffer injury from expenditures arising out of analogous facts. Broader application of this "reasoning" would turn virtually every case failing for proof of injury or where the merits of a plaintiffs' argument are rejected into a "standing" decision.

cert. denied sub nom Weaver v. Steger, 507 U.S. 917 (1993). The core of this argument appears to be the nonmembers' assumption that the indemnification agreement worked as designed and intended.

But like the Ninth Circuit (as well as the Third Circuit in *Hohe*), Respondents focus upon the purported incentives[6] possessed by the union to comply with *Hudson*'s requirements, incentives which proved insufficient to insure the union's compliance with *Hudson*'s requirements more than eight (8) years after the decision. Instead, the Ninth Circuit and Respondents change the subject, focusing on how indemnification of the public employer does not impede the nonmembers' recovery of costs and attorneys' fees under 42 U.S.C. § 1988, and the ruling that "the ultimate cost of any impropriety in the notice and the procedures ... belongs ... on the union." App. A at 16a; 177 F.3d 1102, 1112 (9th Cir. 1999).

However, this bold assertion not only finds no basis in any decision of this Court, it defies one of the core purposes for which the Civil Rights Act of 1871, 42 U.S.C. § 1983, was enacted, *i.e.*, to impose liability **on government** for the constitutional wrongs that it perpetrates, in order "to deter **state actors** from using the badge of their authority to deprive individuals of their federally guaranteed rights." *Wyatt v. Cole*, 504 U.S. 158, 161 (1992) (emphasis added), *citing Carey v. Piphus*, 435 U.S. 247, 254-57 (1978); *see also City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 268 (1981).

What is lacking completely in Respondents' argument is recognition that an indemnification clause's primary purpose is to remove any impediments (*i.e.*, the prospect of suffering financial loss in an award of damages and/or attorneys' fees and costs, or defending against a lawsuit) to the public employer's acquiescence in the seizure of agency fees, a conclusion so self-evident and so

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[6] The prospect of expensive litigation and being denied a portion of the fee to which it was not entitled anyway, Pet., App. A at 17a, are two of the "incentives in a powerful form" which failed to deter EDCEA's conduct here.

discomfitting to the panel below that it dismissed it as "rank speculation," without greater explanation. Pet., App. A at 16a.

This Court plainly held in *Hudson* that "the **government** and union have a responsibility to provide procedures that minimize th[e] impingement [on First Amendment rights] and that facilitate a nonunion employee's ability to protect his rights" when they enter into and attempt to enforce a forced-unionism provision. *Hudson*, 475 U.S. at 307 n.20 (emphasis added). According to Respondents, this explicit statement of "government ... responsibility" "cannot logically be equated with" government's effort to evade that responsibility through an indemnification agreement, simply because a like clause was not at issue in *Hudson*. Opp. at 8. But *Hudson*'s explicit statement of "government ... responsibility" mandates that courts cast a skeptical eye toward government efforts to "place the ultimate cost of any impropriety in the notice and procedures ... on the union," App. A at 16a; 177 F.3d at 1112, even though it is the government which acts as the union's collection agent.

Because virtually every other case supports the nonmembers' claim of standing to challenge a term of the CBA governing their terms and conditions of employment, including the indemnification clause here, Respondents attempt to convert the Ninth Circuit's "ripeness" holding in *Knight v. Kenai Peninsula Borough School District*, 131 F.3d 807, 814 (9th Cir. 1997), into a holding that nonmembers lack standing to challenge an indemnification clause. Opp. at 12-14. Inconveniently, though, a second holding on the issue (arising in a separate case, consolidated for decision), decided the merits of a challenge to an indemnification provision, albeit in the context of the nonmembers' challenge to the enforceability of the indemnification clause under the facts of the case. *Id.* at § IV(C). This portion of the decision cannot be reconciled with the notion that nonmembers lack standing to challenge indemnification provisions in CBAs governing their employment.

II. Private-Sector Bargaining Laws Have No Bearing Upon the Conflicts Among the Circuits in This Public-Sector Case Under 42 U.S.C. § 1983.

Trying to obscure the clear conflicts among the Circuits, Respondents detour into discussions of subjects of bargaining under the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* ("NLRA"). Opp. at 14-16.

Respondents' digression begs the question, since the issue here is not whether EDCEA should have revealed its financial disclosure and procedures while bargaining for a forced-unionism agreement, as it was in those cases. Rather, since a public employer is required to review a union's notice and procedures for constitutional adequacy before taking "adverse action" against its employees by seizing agency fees from them, *Knight*, 131 F.3d at 817, the issue here is whether the union benefitting from those fee seizures may indemnify a public employer from liability when it fails to fulfill its duties. Thus, the Sixth Circuit in *Weaver*, 970 F.2d at 1536-38, did not discuss *North Bay Dev. Disabilities Servs., Inc. v. NLRB*, 905 F.2d 476 (D.C. Cir. 1990), *cert. denied*, 498 U.S. 1082 (1991), because it was utterly irrelevant to the constitutional analysis applicable in *Weaver*.

Respondents' effort to convert this civil rights case into a duty of fair representation ("DFR") case must fail because of the substantially different context in which their construct arises (under the NLRA), as compared to this case under California law. Employees under the NLRA are not subjected to involuntary fee seizures, because the Act bars them, 29 U.S.C. § 186(c)(4), and their claims arise under the DFR, and § 8(a)(3) of the Act, 29 U.S.C. § 158(a)(3), *see Communications Workers of America v. Beck*, 487 U.S. 735, 742 (1988), not under the First and Fourteenth Amendments. Moreover, the powers and responsibilities of the government as a public employer certainly exceed those of private-sector employers in the marketplace. Thus, obscure and outdated decisions from other circuits which discuss the non-liability of private employers for DFR violations, *see* Opp. at 16, *citing Carroll v. Brotherhood of R.R.*

Trainmen, 417 F.2d 1025, 1028 (1st Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970), are of no aid to Respondents.

Furthermore, Respondents' fanciful and cataclysmic prophecies about the consequences of voiding indemnification clauses, Opp. at 17 & fns. 11 & 12, find no basis in fact or law. Moreover, they are better addressed in a brief on the merits, where Respondents might more properly discuss developments in the Sixth Circuit, where indemnification clauses were declared unlawful more than seven years ago, *Weaver*, 970 F.2d at 1536-38, rather than engage in flights of imagination. Instead, Respondents offer musings about "insurmountable burden[s]" of affirmative duties imposed upon public employers, ignoring that the other alternative is for a public employer to determine whether the union has complied with *Hudson*'s requirements and, if it has not, refuse to take "adverse action" against the nonunion employees. *Knight*, 131 F.3d at 817.

Equally implausible is the notion that indemnification here is "analogous in purpose" to an "insurance polic[y]." Opp. at 19. There is nothing "analogous" to the indemnification provision here with those at issue in cases regarding arms-length insurers, *Solo Cup Co. v. Federal Insurance Co.*, 619 F.2d 1178 (7th Cir.), *cert. denied*, 449 U.S. 1033 (1980); *Caplan v. Johnson*, 414 F.2d 615 (5th Cir. 1969), since those "insurers" did not profit from the insured's allegedly unlawful conduct.

III. Further Consideration by the Lower Courts Is Unnecessary, Particularly Where, as Here, the Decision for Which Review Is Sought Is Far Outside the Mainstream of Existing Relevant Decisionmaking.

Respondents also claim that the second question presented — on the legality of the indemnification clause — requires further "percolation" in the lower federal courts, raising various "subtle and difficult issues" cited by the district court in its effort to avoid addressing the question. Opp. at 3, 21. Tellingly, those "subtle and difficult issues" were unworthy of the Ninth Circuit's comment.

Certainly, no other courts have expressed concern over the issues raised by the district court, Opp. at 3, *citing* App. C at 33a, when they adjudicated the constitutional validity of such indemnification clauses. Such "concerns" are irrelevant to the nonmembers' claim, and should not hinder this effort to obtain review.

CONCLUSION

For the reasons stated above, this petition for a writ of *certiorari* should be granted, and the case set for plenary briefing and argument on the important questions presented herein.

Respectfully submitted,

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